Petition

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81-1442
NO. .....

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

PHIL DARNELL LEWIS
and
O. C. NEAL,

Petitioners,

vs.

STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Can a trial court interrogate a crucial defense witness, inform her that she may incriminate herself and that she should have counsel, but, because she was not indigent, make her seek out and hire her own attorney, which she did, only to learn, not surprisingly, that he was unable to come to court on such short notice to represent her; all of which resulted in depriving the defense of its witness?

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Phil Darnell Lewis and O. C. Neal, respectfully pray that a writ of certiorari issue to review the judgment of the Court of Appeal of the State of California, Second Appellate District, filed September 8, 1981.

**There are no other parties to this proceeding.*

OPINIONS BELOW

The trial below was by jury. The decision of the Court of Appeal of the State of California, Second Appellate District Division Two, affirming the judgment, as modified, is contained in Appendix "A" hereto (appendix pp. 1 - 7). A timely Petition for Hearing was denied by the Supreme Court of the State of California on November 27, 1981, and a copy of the post card notice thereof is contained in Appendix "B" hereto (appendix p. 8).

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Sixth Amendment:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Fourteenth Amendment:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioners, Phil Darnell Lewis and O. C. Neal, were charged by information with possession of piperidine and cyclohexanone, and a combination product thereof, with intent to manufacture phencyclidine, in violation of California Health & Safety Code § 11383(b) (count I) and with possession of phencyclidine for sale, in violation of California Health & Safety Code § 11378.5 (count II). (C.T.[1] 1 - 2.) With the exception of a Motion to Reduce Defendant Neal's Bail, no pretrial motions were made on behalf of either defendant.

Trial by jury commenced on September 17, 1980 (C.T. 17). After the prosecution had rested its case, defense counsel informed the court that they intended to call three civilian witnesses. The court, on its own motion and out of the presence of the jury, advised each of the three prospective

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[1]Citations to "C.T." refer to Clerk's Transcript on Appeal.

witnesses of their privilege against self-incrimination and the distinct possibility that their testifying might lead to the filing of criminal charges against them. (C.T. 21.) No prosecution witness was so treated! The court advised the defense witnesses that they were entitled to be represented by counsel who could advise them as to whether or not it would be in their best interests to testify and, further, that if they were unable to afford private counsel, the court would appoint an attorney to represent them at no cost. (R.T.[2] 253.)

Two of the witnesses waived their right to be represented by counsel; however, the third witness, Ms. Dorothy Marset, stated that she wanted to be represented by an attorney (R.T. 258). The court then questioned Ms. Ma et about her finances and concluded that she was not eligible to be represented by the public defender. Ms. Marset was ordered to obtain private counsel and return to court on the following Monday morning. Because this incident occurred on a Friday afternoon and Ms. Marset was intended to be the defendants' first witness, the trial had to be recessed at 2:35 p.m. on Friday. (R.T. 260 - 262.)

On Monday morning, September 22, 1980, Ms. Marset appeared and informed the court that she had consulted an attorney named Armstrong; that Mr. Armstrong was willing to represent her, but that he was unable to appear with her in court at that time due to a conflict in his calendar and wished to have her testimony postponed to another date. (R.T. 263.) The court declined to delay the trial any further and instructed the defense to proceed with its other witnesses.

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[2]Citations to "R.T." refer to Reporter's Transcript on Appeal.

That afternoon, defense counsel, who had been unable to reach her attorney, permitted the court to dismiss Ms. Marset.

The defense proceeded with its remaining witnesses and the cause was submitted to the jury on the afternoon of September 23, 1980 (C.T. 23). After two days of deliberation, the jury requested that the testimony of three witnesses be re-read in its entirety. (R.T. 457.) Shortly thereafter, the jury found defendants guilty on both counts of the Information and also found the defendants to be guilty of violating § 11377 of the Health & Safety Code, illegal possession of a controlled substance, a lesser and necessarily included offense charged with count II of the Information. (R.T. 460 - 461.)

The jury was polled at the request of counsel; however, the jurors were not separately polled as to each verdict. (R.T. 462 - 463.)

At the time of sentencing, however, the court ordered the verdicts of guilty as to the lesser included offense of simple possession stricken and allowed the guilty verdict on count II, possession for sale, to stand. (R.T. 476.) Defendant Lewis was sentenced to a mid-base term of imprisonment of four years (C.T. 74) and defendant Neal was sentenced to an upper term of five years imprisonment (C.T. 76). The defendants received sentences of four years and five years respectively on count II, to run concurrently with those imposed on count I.

Notice of Appeal was timely filed (C.T. 78). Defendant Neal is presently at liberty on bond. Defendant Lewis is in custody. On September 8, 1981, the Court of Appeal of the State of California, Second Appellate District, Division Two, rendered its opinion attached as Appendix "A," affirming the judgment, as modified. On November 27, 1981, the

California Supreme Court denied a Petition for Hearing (Appendix "B"). This petition is timely before this Court (28 U.S.C. § 1257(3)).

STATEMENT OF FACTS

Officer Steven Foster of the Los Angeles Police Department was responding as a back-up unit to investigate a possible homicide at approximately 4:30 p.m. on the afternoon of December 29, 1979. He was northbound on Broadway Avenue in his patrol car, approaching 87th Street, when he detected a strong chemical odor in the air. (R.T. 10 - 11.) He recognized the odor as the kind which is emitted by PCP laboratories. (R.T. 12.) Officer Foster and his partner, in full uniform, continued on their way to the scene of the homicide, determined that their presence was not necessary there, and returned to the area of Broadway and 87th Street accompanied by four other uniformed officers. (R.T. 13.) They began searching the area to determine the origin of the chemical odor and determined that its source came from within an empty building at 8705 South Broadway which had previously been a furniture store. (R.T. 14.) The store was in a business area and other businesses adjacent to the premises were open. There were a number of people on the sidewalk. (R.T. 14.)

There were large padlocks on the doors of the business, front and back, and there were metal grating protecting both the front and back doors. The windows had been painted over with white paint, so that the officer was not able to view the interior of the building. (R.T. 15.)

Officer Foster peered through a crack between the front doors and was able to see a bench at the rear of the building.

He went to the rear of the building, stuck his head through a small corner of a window which had been broken out, and saw two dark objects inside. He heard noise and detected a strong chemical odor coming from within the building. (R.T. 15.) It was very dark within, and he could see two shadows moving at the bench. (R.T. 16.)

Officer Foster immediately advised the officers with him that the suspects were inside the building, and that the area should be secured. Through traffic on Broadway was blocked in both directions, and the sidewalks were cleared. (R.T. 17.) The fire department and a police helicopter were summoned to the scene. (R.T. 18.) After the building had been cordoned off and secured, Officer Foster noticed someone looking out of the window from the upper story of the building. This person appeared to be wearing a gas mask. (R.T. 18.)

For the next 30 minutes, the officers attempted to get the individuals within the building to come out, using the public address systems built into their patrol cars. (R.T. 20.) They received no response. All of the entrances to the building were locked, and the officers were unable to gain entrance. (R.T. 21.) Ultimately, however, Officer Owens walked up to the front door and yelled to the persons inside that if they did not come out, he would throw a cigarette in. (R.T. 109.) At that point defendant Neal opened the front door and tossed a key ring through the metal grate onto the sidewalk. The defendants were arrested and handcuffed to the grate while the officers attempted to unlock the grate by means of the keys. (R.T. 24.) In the meantime, the fire department had cut the locks off another door at the front of the building, and the door at the rear.

(R.T. 24.) Officer Foster and five other officers then went inside the building, after donning respirators borrowed from the fire department. (R.T. 24.)

Officer Roger Gilbert was one of the first to enter. He found that there was a haze and a strong chemical odor permeating the entire building. (R.T. 144 - 45.) He found paint cans, paint rollers and bottles on the ground floor. Downstairs he observed shelves with various containers on them, and the toilets in the bathrooms were overflowing with a milky-white substance. (R.T. 145.) When his respirator malfunctioned, he smelled an extremely strong chemical odor, which caused pain in his lungs and made him lightheaded. (R.T. 146.)

Officer Foster, after taking the defendants into custody, noticed that their clothing was very damp and emitted an odor which he associated with PCP. (R.T. 25.) It was stipulated that both of the defendants had PCP on their pants. (R.T. 181.)

Defendants were transported to the station and booked. Officer Foster returned to the location at 8705 South Broadway and found that the chemical odor coming from within was too strong to permit him to enter. The fire department was ventilating the building with large fans. The police officers assembled were required to wait for two and one-half to three hours to conduct a thorough search of the building. (R.T. 27.) After the fumes had dissipated, Officer Foster and others went into the vacant building and retrieved, from the wooden bench, two gas masks, a paint roller and roller tray, numerous bottles, and a piece of paper bearing a formula for manufacturing PCP. (R.T. 28.)

Downstairs, in the basement of the building, Officer

Foster observed numerous wooden shelves and drying racks with white crystal-like formations on them, numerous bottles and buckets, a crystal-type material on the floor, and various liquids in containers. Within the bathroom, there were sinks and toilets clogged with a crystal-like material which emitted a very strong chemical odor. (R.T. 29.)

Richard Bingle, Chief Forensic Chemist for the City of Los Angeles, was also present to take inventory of the building's contents. He conducted a general search for flamable or toxic chemicals and took photographs and samples of most of the chemical substances he found. (R.T. 195 - 215.) He also testified that the piperidine cyclohexane carbonitrile is an intermediate product in the manufacture of PCP. (R.T. 216.)

It was stipulated that substantial quantities of piperidine cyclohexane carbonitrile, otherwise known as PCP, as well as 30 milliliters of phencyclidine, or PCP, were found upon the premises. (R.T. 222 - 23.)

Virtually all of the bottles, cans and buckets found in the otherwise empty building were dusted for latent fingerprints. (R.T. 218 - 19.) However, only one print was obtained linking either of the defendants with the containers. That was the palm print of defendant Lewis lifted from a five-gallon gas can. (R.T. 187.)

Officer Joseph Stanley of the Los Angeles Police Department's Administrative Narcotics Division testified an an expert in the field of manufacturing, packaging, sale and distribution of PCP. He testified that the two main ingredients in phencyclidine are piperidine and cyclohexanon. (R.T. 228.) He testified as to the manner in which they are combined to create the final product, which is a PCP crystal. (R.T. 228 - 29.) He explained how the piece of paper found on the bench

constituted a formula or recipe for the manufacture of PCP and stated that based upon the types of chemicals and quantities found in the premises he formed the opinion that the building was being used as a PCP laboratory. (R.T. 230 - 34.)

Thomas Lander testified that he was the manager of the business located next door to the former furniture store at 8705 South Broadway. (R.T. 172.) Around the beginning of December, 1979, he noticed an unusual odor coming from the building next door. It smelled like ether. (R.T. 172 - 73.) He also noticed two black males at the back of the builidng who appeared to be loading or unloading a station wagon, but he could not identify the defendants as the persons whom he saw. (R.T. 174- 75.)

Donald Taylor, a young man who was receiving radio installation training at Mr. Lander's business, also testified that prior to the last week of December, 1979, he smelled an odor which he associated with PCP emanating from the building next door. He went inside the building and looked around but did not see anything. (R.T. 128 - 29.) During December, the odor was, at times, strong enough to make him feel sick. (R.T. 130.) He also saw two males sitting in a dark station wagon at the rear of the building, but he could not identify them. (R.T. 131 - 32.)

DEFENSE:

There was never any question or dispute about the fact that the building contained many chemicals which are the precursors of PCP, a large quantity of PCC, an intermediate compound which, when combined with a cyanide, yields PCP, as well as a relatively small amount of PCP itself (30 milliliters). The defendants never contended that the base-

ment of the building was not being used by someone to manufacture PCP. The defense was that they were not the "chemists," and had no knowledge of the illegal operation.

Robert Watson, a journeyman carpenter, testified that on or about December 19, 1979, he leased the building at 8705 South Broadway. (R.T. 266.) It was his intention to rennovate the building and turn it into a restaurant and discotheque. (R.T. 266.) On the day that he executed the lease, he was given a key to the building and inspected the premises for ten or fifteen minutes. (R.T. 267.) The interior needed alterations, painting, and there was a great deal of clean-up work to be done both inside and out.

Mr. Watson contacted Mr. John Henry, a contractor experienced in building the kinds of clubs he was interested in, and he sought Mr. Henry's advice and assistance in performing the construction. (R.T. 269.) He gave Mr. Henry a key to the premises and showed him the debris, both inside and outside the building, which needed to be cleared away. (R.T. 269 - 70.) He did not detect any unusual odors when he visited the premises on December 19. (R.T. 272.) He advanced the sum of $75.00 to John Henry to pay someone to clean up the building. (R.T. 284.) He was not personally acquainted with either of the defendants. (R.T. 276 - 77.)

John Henry testified that he is a contractor, and that he was asked by Mr. Watson to assist in the construction of a restaurant and disco club at 8705 South Broadway. (R.T. 306.) He met with Mr. Watson at the location around December 20, and saw that there was a great deal of debris, inside and out, which needed to be cleaned up. There were many containers, varnishes, cans, boxes, bottles and buckets

on the ground floor and in the basement. (R.T. 310.) It also appeared that transients had been living in the building. (R.T. 311.)

Mr. Henry attempted, without success, to get a number of persons to undertake the clean-up chores. He happened to have one of defendant Neal's business cards identifying him as a "handyman," and when he called Neal on December 29, 1979, Neal accepted the job. (R.T. 316 - 17.) Neal had never worked for or met Mr. Henry before that day. (R.T. 317 - 18.)

Mr. Henry met Mr. Neal for the first time at the rear of the building at approximately 12:45 or 1:00 p.m. Mr. Lewis arrived shortly thereafter. Mr. Henry told the defendants that he wanted all of the junk and debris inside and outside the building cleaned up and hauled away and paid them $50.00 as an advance on the agreed price of $150.00 for the work to be performed. (R.T. 317 - 18.) He also instructed them to paint the windows with the paint and rollers, which he himself had brought to the building that day, so that transients would not be able to see through the windows and be tempted to steal the equipment which he planned to store within. (R.T. 320 - 21.) He gave them a key to the lock on the front door and instructed them to throw the key through the grate at the back door after they had locked up and before leaving. (R.T. 322 - 25.)

Mr. Henry also noticed a strong chemical odor originating from the basement. He suspected this was caused by varnish or lacquer left over from the furniture store, and he told the defendants to clean up the basement. (R.T. 323.) He then left the premises.

Mr. Henry returned to the location around the 2nd of

January, 1980, and discovered that the clean-up work had not been completed. He had no knowledge of what had occurred at the premises and assumed that the men he had hired had simply taken the $50.00 advance and walked off the job. (R.T. 328.) He did not see either of the defendants again nor did he learn what had actually happened until he was contacted by defendant Neal in July of 1980. (R.T. 327.)

Each of the defendants testified on their own behalf. They stated, in essence, that they had no dealings with each other or Mr. Henry prior to December 29, 1979; that on the morning of that day, Mr. Neal received a telephone call from Mr. Henry who offered to pay him for cleaning up the building; that Mr. Neal met Mr. Lewis at a gym in Lynwood and asked him (Lewis) to assist in the clean-up operation; and that they both arrived at the building, in separate vehicles, at about 1:00 p.m. (R.T. 361 - 65, 410 - 12.) Mr. Henry showed them around the building, told them to clean up the junk and haul it away, handed them a key and the sum of $50.00, and then left the premises. (R.T. 361 - 71, 413.)

The defendants proceeded to the basement where they found many cans, bottles, plastic buckets and the like, and they started dumping the contents of these containers down the toilets, but then the chemicals started to give off such strong odors that the defendants were forced to abandon the basement and go up to the ground level where they commenced painting the windows. (R.T. 372 - 77, 413 - 17.) They also piled up various pieces of debris so that they could be hauled away.

While the defendants were in the clean-up process, they heard a helicopter overhead and noticed a number of police officers in the area. They did not hear any commands to come

out of the building. Mr. Neal tried to get the attention of an officer at the back door to find out what was going on, but the officer drew his gun, and this frightened Mr. Neal back into the building. All of the other entrances were locked, so that there was no other way defendants could get out of the building. Fearing for their safety, they went to one of the front doors. They were met at the locked metal grate by police officers, who placed them under arrest. (R.T. 377 - 80, 417 - 20.)

The defendants denied that they wore any gas masks and further denied any knowledge of the character of the chemicals found within the building.

REASONS FOR GRANTING THE WRIT

This Court is here presented with *a case of first impression* and one which concerns a problem occurring with great frequency in criminal trials. The trial court below—in a case wherein the evidence was so close that the trial, which lasted but two days, required jurors deliberating an equal length of time, *sua sponte*—admonished all three defense witnesses (excepting the defendants) that they were likely to incriminate themselves and should seek counsel prior to giving testimony. No admonitions were given any prosecution witness. A crucial defense witness, Ms. Marset, was declared ineligible for court-appointed legal counsel because she was not an *indigent witness.* The court recessed proceedings on Friday afternoon, and they resumed the following Monday morning, at which point the trial judge interrogated Ms. Marset concerning the whereabouts of her retained legal counsel. She informed the court that she had hired an attorney to represent

her, but that the attorney was engaged elsewhere and would the court advise him when he should be available. The court declined to do so, and the witness was excused, thus depriving the defendants of her vital testimony.

What *is not at issue* here is the right of a state to refuse to provide legal counsel to defendants or witnesses who have the necessary funds to employ their own. What *is at issue* here is the court's right to disrupt a trial in progress and effectively eliminate a witness's testimony because the witness is told she should consult an attorney and have him present before testifying; then requiring the witness to (1) locate an attorney and set up an appointment with him; (2) keep the appointment, ascertain his advice and his fee; (3) pay the fee; and (4) guarantee that the attorney can discard all prior commitments and be present with the witness in court immediately.

In the present case, the failure of the witness to accomplish all of the above between Friday afternoon at 2:35 p.m. and the commencement of court proceedings the following Monday morning resulted in her being dismissed and the loss of her testimony by the defense.

The approach utilized by the trial court in this case allows the court to effectively intimidate defense witnesses and prevent their testimony, in violation of Sixth Amendment rights. Now, through the process of imitation, many defendants are losing these precious rights and more will do so as time goes on unless this Court forestalls this type of abuse.

ARGUMENT

Petitioners Were Denied Due Process Of Law And A Fair Trial, Under The Sixth And Fourteenth Amend-

ments To The United States Constitution, When The Trial Court, *In A Case Of First Impression,* On Its Own Motion, Ordered A Witness, Who Was About To Testify For The Defense, To Hire Private Counsel, An Act Which Ultimately Resulted In The Petitioners Being Deprived Of The Witness's Testimony.

After the prosecution rested, the defense announced that it would call as its initial witness Dorothy Marset. She was in court and ready to testify. She had a possessory interest in the property at 8705 South Broadway–where the crime was committed–during the criminal activity conducted there and remained the owner at the time of trial. Also, during the crucial time period, she actually visited the premises. The trial judge, on his own motion, admonished her that if she had a possessory interest in the property she might incriminate herself. (R.T. 257 - 60.) The court, despite the in-trial situation, proceeded to interrogate her concerning income and property holdings (including a self-incriminatory question to which she responded in the affirmative concerning ownership of the premises where the contraband was seized), then concluded that, because she was not sufficiently impoverished, she would have to hire her own attorney rather than to be able to utilize the services of the public defender or a private attorney usually obtainable from the same or a nearby courtroom, which is the common practice. (*Ibid.*) Of course, when she was compelled to hire a criminal lawyer, his services were not necessarily available in an instant and, additionally, financial remuneration had to be considered. The trial was then recessed for the remainder of the afternoon

(Friday).

Ms. Marset returned on Monday morning and *informed the court that her attorney, Mr. Armstrong, had another matter in another courtroom and could not be present to represent her but would if the court would call his office for a suitable date.* (R.T. 263.) An irate court then instructed Mis. Marset to have her attorney contact the court to arrange a time when he could be present for her testimony and ordered the defense to proceed with its other witnesses at 10:35 a.m. At 1:57 p.m., the same day, the attorney for Mr. Neal advised the court that he had been unable to speak with Mr. Armstrong but that he had no objection to Ms. Marset's being excused until he contacted him, which neaver happened. (R.T. 315.) The witness never did testify.[3]

The best method of highlighting what was egregiously wrong with the trial judge's unprecedented procedure is to assess the practical considerations against a backdrop of appropriate constitutional concerns like the right to a fair trial and to present and confront witnesses as enshrined in the Sixth Amendment and rendered applicable to the states through the Fourteenth Amendment. *See, e.g., Washington v. Texas*, 388 U.S. 14, 19 (1967); *Webb v. Texas*, 409 U.S. 95 (1972); *Pointer v. Texas*, 380 U.S. 400 (1965); *Douglas v. Alabama*, 380 U.S. 415 (1965); *Brookhart v. Janis*, 384 U.S. 1 (1966); *In re Mosley*, 1 Cal. 3d 919 (1970).

It is fundamental that a defendant whom the state seeks

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[3]All three of the defendants' witnesses (apart from the defendants themselves) were admonished as to possible self-incrimination by the trial judge. No prosecution witness was so treated.

to deprive of his liberty be accorded a fair trial, which encompasses the right to summon witnesses in his behalf. *Webb v. Texas, supra; Washington v. Texas, supra.* This is frequently the most responsible and necessary means of defending one's self. In the present case, the issue of who had control of the premises and the dimensions and variety of that control was of decisive significance.

In *Webb v. Texas, supra,* the trial judge, on his own initiative, during a recess, singled out the only prospective defense witness for a lengthy admonition on the dangers of perjury. Not only warning the witness of his right to refuse to testify, and of the need to tell the truth, the judge went on to imply that he expected the witness to lie, and that, if the witness did so, he would be prosecuted and probably convicted of perjury. The witness then refused to testify for any purpose. This Court held that the threatening remarks effectively drove the witness off the stand and deprived the defendant of due process of law.

In *Webb,* the failure of the defense counsel to offer a timely objection and the total lack of an offer of proof to demonstrate damage to the defendant's case were deemed insignificant given the nature of the constitutional right denied. The Court relied upon the Sixth Amendment to the United States Constitution, which explicitly provides for the defense to call witnesses in its behalf.

> "In all criminal prosecutions, the accused shall enjoy the right . . . *to have compulsory process for obtaining witnesses in his favor,* and to have the assistance of counsel for his defense." (Emphasis supplied.)

Moreover, this Court reaffirmed the wisdom contained

in the case of *Washington v. Texas, supra,* 388 U.S. at 19, as follows:

> "The right to offer testimony of witnesses and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law."

Webb admittedly involved an extremely hostile act of intervention by the trial judge; however, the principle should not be devoured by its foremost example.

In this case, the court had no duty to obtain "waivers" of Fifth Amendment rights from defense witnesses before they testified. By doing so, the court interfered with the orderly presentation of the defendants' evidence, and by ordering Ms. Marset to obtain private counsel (an unprecedented move), ultimately deprived the defense of Ms. Marset's testimony altogether. The ruling placed the defendants at the mercy of the witness and her attorney, thereby encumbering and delaying the trial. The trial court could have corrected its initial error by appointing the public defender to advise the witness on Monday, when her attorney could not appear, even though she was not indigent. The interests of the defendants in exercising their constitutional right to put on a defense clearly would have outweighed any minor expense to the

state in appointing an attorney to advise the witness. Such a practice would have a beneficial effect on the administration of justice, in that it would expedite trials and preserve the constitutional rights of criminal defendants as well as potential witnesses.

Given the preceding observations, what should the trial judge have done, bearing in mind that an appellate statement of what procedure is most salutary addresses a problem which asserts itself with great frequency but low visibility because it has always been handled by appointing the public defender or a nearby attorney. To begin with, neither the Attorney General nor the Court of Appeal of the State of California cited any authority which required the trial judge to admonish a witness to dread incriminating herself or himself, because there is none, although arguably it is a healthy proposition–but not if it disrupts the trial and results in denying the defendant the benefit of testimony. Secondly, given the fact that a defense to a trial may take no time at all because the defense can rely on the prosecution's failure to prove a case–or may last merely a day or two, as in this case, it is essential that if a judge chooses to advise a witness of his fears concerning the prospects of self-incrimination, that he couple that fear with some satisfactory mechanism for resolving it which does not unduly intimidate the witness or, because of practicalities of stress, time and money, deter the witness from giving presumably helpful, often decisive testimony. Consequently, we must compare the usual technique of calling upon the public defender for assistance or appointing a private attorney to give independent advice, with the one invoked in this case of asking a witness in court to hire an attorney on her own, who must be almost instantly

reachable, and set up an appointment, discuss the fee, raise the money for the fee, pay the fee, discuss availability, etc.

It is a precept fraught with difficulty which requires the trial judge to make a defense witness in court enter upon a private quest for a lawyer and cope with all of the foreseeable problems. If that approach can be utilized in this case, it can be utilized in others; and the counsel seeking the witness's testimony which will prove helpful to the accused can ill afford to demand that a witness not consult private counsel once the awesome authority of a judge delivers that unmistakable message. What kind of result could we expect if the defense attorney responded with: "We don't have time for her to seek out an attorney of her own choosing, Judge. How about appointing one? In fact, my friend, Mr. Smooth, is down the hall in Department Heaven, and he could use the money!"

When Ms. Marset located a private attorney, he, not surprisingly, left a message that he was presently unavailable but to have the court contact him for a suitable date. This angered the trial judge so that he expressed his consternation by stating that he would not contact the attorney; that the attorney should contact the court. (R.T. 263.)

But none of this counterplay was of any assistance to Ms. Marset, much less the defendants on trial who were desirous of producing an unintimidated witness. And, giving everyone the benefit of the doubt, counsel may have conceived of his chore as a favor to the court, because the circumstances surrounding the visit to his office by an obviously confused Ms. Marset required him to sail in uncharted waters. The court, on the other hand, obviously conceived of the situation as the routine hiring of an attorney and so, understandably, bristled at the thought that he was obliged to contact defense counsel

to agree upon an appropriate "date."

The well-intentioned trial judge created a fiasco which resulted in the defendants' being deprived of what might have been crucial evidence. This was, after all, a very close case. The jury deliberated for two full days, the same amount of time it took to present the evidence; and then the verdicts were reached only after all of the testimony of Officer Foster, defendant Neal, and Mr. Lander was re-read. The evidence of guilt clearly rested on a hairline, and we are in no position to speculate concerning the impact of testimony.

Obviously, "what's sauce for the goose is sauce for the gander," so, if the trial court's decision to send Ms. Marset on a wild goose chase for an attorney made to order for the pressing predicament was correct, this Court must condone the same conduct if requested by the defense. If it appears that a prosecution witness might incriminate herself, it is uncumbent upon defense counsel to:

(1) Ask that she be warned that she should not testify unless she has been advised by legal counsel as to whether she might incriminate herself, or after consultation with counsel elects to waive her Fifth Amendment rights;

(2) Insist that the trial judge inquire as to the state of the witness's finances before appointing the public defender or private counsel to handle a task demanding immediate attention (presently done as a matter of routine);

(3) If it appears that the witness is not impecunious, remind the judge that in the Lewis and Neal case the court was right in declaring the witness ineligible for the public defender or court-appointed counsel and that it would be improper and also a denial of Equal Protection of the Law to do either with a prosecution witness.

This, then, would require that the courts have some reasonable notion about what a counsel would charge to represent a witness in such a proceeding on such short notice. This counsel has performed an identical service perhaps twenty times as an officer of the court, without remuneration, but has never heard of a going rate for such a service. Further, defense counsel has the right to object to anything more than a temporary recess in the trial, because there is no authority which permits the prosecution to seek and obtain recesses so that its witnesses can obtain private counsel to ponder with them about jeopardizing their constitutional rights or appearing in court. Of course, if a prosecution witness incriminates himself, it is less likely that he or she would experience prosecution than a defense witness who is always a threat to destroy the prosecution's case.

This case was so evenly balanced that Ms. Marset's past and present possessory interest and visit to the premises during the critical time period should suffice to warrant a new trial, and in this case of first impression, wherein a trial judge's benign concern that a witness might incriminate herself led him to compel her to seek unavailable counsel due to lack of indigence and therefore effectively eliminated her as a witness, warrants review by this Court.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

LUKE McKISSACK

Attorney for Petitioners

Appendix

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OPINION BELOW

NOT TO BE PUBLISHED

In the Court of Appeal of the State of California, Second Appellate District, Division Two.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. PHIL DARNELL LEWIS and O. C. NEAL, Defendants and Appellants.

2D CRIM. NO. 38984.

(Superior Court No. A617415).

[Filed September 8, 1981]

Phil Lewis and O. C. Neal appeal from the judgments entered following a jury trial in which they were found guilty of possessing piperidine and cyclohexanone and a combination product thereof with the intent to manufacture phencyclidine (PCP) (Health & Saf. Code, § 11383, subd. (b), count I) and possessing PCP for the purpose of sale (Health & Saf. Code, § 11378.5, count II).[1] They contend: "I. The unexplained failure of defense counsel to move for suppression of evidence under Penal Code § 1538.5 and to object to obvious irregularities in the proceedings amounted to a denial of the defendants' Sixth Amendment right to the effective assistance of counsel. II. Defendants were denied due process and a fair trial when the court, on

[1]In count II the jury returned guilty verdicts to both possessing PCP for purpose of sale and the lesser included offense of possessing PCP. This forms the basis for appellants' third contention, *infra.*

its own motion, ordered a witness, who was about to testify for the defense, to obtain private counsel, an act which ultimately resulted in the defendants' being deprived of the witness' testimony. III. The inconsistent and uncertain verdicts returned by the jury on count II compel a ruling that defendants have been acquitted of the greater offense of possession of a controlled substance for sale and convicted only of the lesser included offense of simple possession. IV. The concurrent sentences on count II were imposed in violation of Penal Code § 654."

Viewed in the light most favorable to the judgment as is required by the usual rule governing appellate review, the evidence established that at approximately 4:10 p.m. on December 29, 1979, Los Angeles Police Officers Steven Foster and Thomas Owens detected the strong odor of ether associated with PCP coming from an abandoned furniture store. Peering through a broken window partially covered with boards and an area between two doors where the weather stripping had worn away, Officer Foster observed two figures at a work bench. For approximately 30 minutes the officers unsuccessfully ordered the occupants of the building to exit. They finally did so only after Officer Owens shouted that he would throw a cigarette inside.

Several officers with gas masks then entered the building and observed that it was full of mist and an overpowering odor of ether. After approximately two to three hours during which the fire department ventilated the building, police officers reentered and on the basement level discovered that the toilets and sinks were overflowing with chemicals which had been dumped into them. They recovered containers of PCP, piperidine cyclohexanone carbonitrile (PCC, a

chemical intermediate step in the making of PCP), piperidine, hydrochloric acid, sodium cyanide, sodium bisulphate, petroleum ether, ethyl ether, cyclohexanone, and sodium hydroxide, all ingredients used in making PCP. Two gas masks and the formula for producing PCP were also found on the premises.

It was appellants' defense that they were only handymen who had been hired to clean the building and they had not been manufacturing PCP.

Appellants' first contention is based upon their claim that trial counsel should have moved to suppress the proofs of their guilt on two theories: (1) the police entry after the building had been ventilated was not an emergency and (2) their reasonable expectation of privacy had been violated when the police looked through the window and cracks in the doors. However, incompetency is never shown by a trial counsel's failure to make patently meritless motions. (*In re Frank G.* (1980) 104 Cal. App. 3d 593, 595; *People v. Eckstrom* (1974) 43 Cal. App. 3d 996, 1003.) The police were, of course, required to investigate to discover the source of the extremely dangerous contraband and the exigent circumstances continued to exist even two or three hours after the initial discovery since a large quantity of dangerous chemicals were on the premises and potentially volatile. (*Cleaver v. Superior Court* (1979) 24 Cal. 3d 297; *People v. Patterson* (1979) 94 Cal. App. 3d 456, 465; see *Guidi v. Superior Court* (1973) 10 Cal. 3d 1, 17, fn. 18.)

Appellants' second contention is equally meritless. When the People had rested, appellant Neal's counsel stated that he would be calling two men to testify they had been in possession of the building during the month of

December of 1979. The court advised these witnesses of the possibility that their testimony could be self-incriminating and of their right to consult an attorney. Nonetheless, each of them decided to testify without such representation. Later that day, counsel also informed the court that he would call as witness one Dorothy Marset who apparently owned the building. The following occurred:

"THE COURT: Dorothy Marset. Miss Marset, I have been informed by both defense attorneys that it is your intent to testify in this matter this afternoon, and that it is your intent to testify that you had a possessory interest in the premises of 8705 South Broadway, at least from December 1st to December 29th, 1979, and that on a particular date during that period, that you actually visited the premises.

"Now, the Court is advising you at this time that if it is your intent to testify in that manner, admitting those facts, it may very well be that you will incriminate yourself. Not only that, that the testimony that you give may, and probably will be used against you, which means that you could have charges filed against you, and you could be prosecuted.

"Before you take that witness stand and testify, the Court is advising you that you have a constitutional right to be represented by an attorney, and if you do not have the money or means with which to hire an attorney, the Court will appoint an attorney to represent you at no present cost to you.

"Do you understand that?

"MS. MARSET: Yes.

"THE COURT: Now, is it your desire to be repre-

sented by an attorney so that an attorney can advise you as to your personal interests prior to taking the witness stand?

"MS. MARSET: Yes.

"THE COURT: Do you have the money and means with which to hire an attorney?

"MS. MARSET: No. Well, see, I didn't know that I would have to have an attorney. I was just coming to - -

"THE COURT: Explain. I understand. But, the fact is that if you testify as to what I have been advised that you are going to testify to, that could incriminate you to the point where charges could be filed against you, and you could be prosecuted.

"So, before you do that, this Court has to be sure that you understand what you are doing.

"MS. MARSET: Well, I don't understand what I am doing.

"THE COURT: So, again, do you have the money or means with which to hire an attorney?

"MS. MARSET: No.

"THE COURT: Are you employed?

"MS. MARSET: Yes.

"THE COURT: What is your salary?

"MS. MARSET: Eight hundred a month.

"THE COURT: Do you currently own the premises, 8705?

"MS. MARSET: Yes.

"THE COURT: Can I assume that you own other property?

"MS. MARSET: Yes.

"THE COURT: You are not going to qualify for the

services of the public defender. So, you would be required to hire your own attorney.

"MS. MARSET: Well, could I speak with Mr. Byers?

"THE COURT: You can speak with him, but I have to advise you that each attorney represents one of the defendants. You have to keep in mind they represent these two defendants. They don't represent you, and their first interest is their clients.

"My advice to you would be to hire an attorney that would be representing your interests.

"MS. MARSET: I see.

"THE COURT: Do you understand?

"MS. MARSET: Yes."

On the next court date Ms. Marset advised that she had retained an attorney. The following is then reported:

"MR. BYRON [defendant Neal's counsel]: Mrs. Marset is here, and I haven't spoken to counsel. I would have no objection to her being excused, Your Honor. When and if I do make contact with her counsel and I decide the difficulty, then I can call her.

"THE COURT: Very well.

"Is there any objection on the part of the People?

"MR. HODGMAN [deputy district attorney]: No, Your Honor. Whatever they can work out is fine with me.

"THE COURT: Mrs. Marset, you are excused at this time. You do not have to remain any longer.

"MRS. MARSET: Okay. Thank you."

No further mention was ever made of Ms. Marset or her testimony.

It is manifest that the trial court did not deprive appellants of the testimony of Ms. Marset by merely warning

her of the dangers inherent in her testifying. Defense counsel was not prohibited from calling her as a witness and why he did not do so is not revealed by the record. Nothing in *Webb v. Texas* (1972) 409 U.S. 95 would require a contrary conclusion.

Appellants' third contention also fails. Since the jury expressly found appellants guilty of both the greater offense of possessing PCP for sale as charged in count II and the lesser offense included therein of simple possession (Health & Saf. Code, § 11377), the trial court appropriately struck their convictions for the lesser included offense. (*People v. Moran* (1970) 1 Cal. 3d 755, 763.)

Although of no pragmatic significance since the adoption of the determinate sentencing law, appellants' final contention that even concurrent sentences should not have been imposed is meritorious. That is to say, it is clear, as respondent concedes, that appellants' manufacturing and possession for sale of PCP were but parts of one criminal enterprise.

The sentences imposed on each appellant as to count II are stayed pending completion of their sentences on count I and thereafter permanently. In all other respects, the judgments are affirmed.

NOT TO BE PUBLISHED.

BEACH,
J.

We concur:

ROTH, P.J.

COMPTON, J.

DENIAL OF PETITION FOR HEARING
(Post Card Notice)

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102

NOV 27 1981

I have this day filed ORDER

HEARING DENIED

In re: 2 Crim. No. 38984

People v. Phil Darnell Lewis & O. C. Neal

Respectfully,

Clerk

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
County of Riverside)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Riverside, California, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 1340 West Sixth Street, Corona, California 91720, that on JANUARY , 1982, I served the within PETITION FOR WRIT OF CERTIORARI to the Court of Appeal of the State of California, Second Appellate District, on the following named parties by depositing the designated copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid in the United States Post Office in the City of Corona, County of Riverside, State of California:

Attorney General, State of California
3580 Wilshire Boulevard
Los Angeles, California 90010 (3 copies)

District Attorney
County of Los Angeles
210 West Temple Street
Los Angeles, California 90012 (1 copy)

Court of Appeal, Second Appellate District
3580 Wilshire Boulevard (Ref. No. 2d Crim. 38984)
Los Angeles, California 90010 (1 copy)

Clerk of the Superior Court
200 West Compton Avenue
Compton, California 90220 (1 copy)
Ref. Super. Ct. No. A617415)

I declare under penalty of perjury that the foregoing is true and correct.

Executed on JANUARY , 1982, at CORONA, CALIFORNIA.

D. A. Standefer

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